Supreme Court, U.S.
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No. _____

UNITED STATES SUPREME COURT

October 1992 TERM

DIANA M. MAULDING Petitioner

v.

LOUIS W. SULLIVAN, Secretary of Department of Health and Human Services; DEPARTMENT OF HEALTH AND HUMAN SERVICES Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner
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QUESTIONS PRESENTED FOR REVIEW

1. When conducting a judicial review of a decision of the Merit Systems Protection Board, should the reviewing court apply the standards set forth in 5 U.S.C. Sec. 7703(c) to the employing agency's actions or should the standard in 5 U.S.C. Sec. 7703(c) be applied to the Merit System Protection Board's final decision?

2. Can a court judicially reviewing a final Merit Systems Protection Board decision ignore credibility based findings of fact made by the MSPB administrative law judge?

3. When applying the rules set forth in 29 C.F.R. Sec. 1613.701 et seq. to a federal employee claiming handicapping discrim- ination, can the trial court choose among the criteria described disjunctively, some of which would prevent recovery for the employee and some of which would allow recovery for the

employee, or must the trial court use the disjunctively presented criteria in such a way that if the employee fit one of the disjunctively described criteria, judgment should be for the employee?

4. Must the Court of Appeals address all issues appealed to it in the Court of Appeals' opinion?

PARTIES

Same as captioned.

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HISTORY OF OPINIONS IN THIS CASE

January 18, 1989: Petitioner prevailed after a hearing in front of Merit Systems Protection Board administrative law judge.

December 18, 1989: Petitioner does not prevail after the full Merit Systems Protection Board reviewed the file.

July 1, 1991: Petitioner loses on all claims after the district court judicially reviewed the MSPB final decision and de novo trial on the handicapping and sex discrimination claims.

April 7, 1992: Petitioner does not prevail before the Eighth Circuit

May 5, 1992: Petitioner's petition for rehearing is denied by the Eighth Circuit

JURISDICTIONAL STATEMENT

1. Date of entry of judgment to be reviewed: April 7, 1992

2. Date of rehearing: May 5, 1992

3. Jurisdictional grounds for the petition for writ of certiorari: final decision of a court of appeals, R.U.S.S.C. Rule 10

STATUTES AND REGULATIONS RELIED UPON IN THIS CASE [FULL TEXT IS IN THE APPENDIX]

5 U.S.C. Sec. 7703(c)

5 U.S.C. Sec. 7702(d)(1)

5 C.F.R. Ch. II (1-1-88 Ed.) Secs. 1201.3, 1201.111, 1201.113, 1201.114

29 C.F.R. Secs. 1613.701 et seq.

28 U.S.C. Sec 1291

5 U.S.C. Sec. 552a(a)(1-5)

5 U.S.C. Sec. 552a(e)(3)(A)-(D)

5 U.S.C. Sec. 552a(e)(9)

5 U.S.C. Sec. 552a(g)(1)(D) and (2)(B)

STATEMENT OF THE CASE

Petitioner was a career federal employee employed by Respondent Department of Health and Human Services from January 1976 through May 13, 1988. Petitioner had been, from 1976-1980, in a lab and from 1980 forward in an office setting writing scientific reports. Petitioner had sought medical help for prolonged breathing difficulty both after phosgene exposure in 1974 while employed at a Louisiana chemical plant and also in the time frame of 1976 through 1980 when solvents at DHH's labs caused the same breathing problems as occurred in the aftermath of the phosgene exposure. This information regarding the breathing problems was disclosed during Petitioner's DHHS fitness-for-duty examination in 1980 and 1981 forward and appeared on the DHHS's doctor's data sheets for those

years, data sheets which remained at all times in the exclusive control and possession of DHHS at the work site. The solvent-induced breathing problems were disclosed to two of Petitioner's supervisors at DHHS in the 1976-1980 time frame. At trial, one such supervisor could not recall such a conversation but this ex-supervisor was then a named defendant in a lawsuit for which Petitioner was an attorney for the plaintiff.

Petitioner had, in May 1987, challenged a position classification system being implemented at Petitioner's work site. The challenge was in the form of a query at a staf metting held by management to answer staffers quetions regarding the proposed--and later implemented--position classification system counter to the one in the federal code. When managemnt told

Petitioner to shut up and sit down in the midst of an otherwise un- eventful meeting, the room erupted in cheers, shouts and catcalls that management take that same advice. Meeting attendees were assured that the OPM had approved the new position classification system and within a month of Petitioner's written request for that written approval from OPM to DHHS regarding the new classification system, DHHS had had its contract medical advisor in Rockville, MD devise medical tests the DHHS demanded Petitioner produce to avoid an assignment to a lab.

This lab assignment was verbally proposed in June-July 1987 when Petitioner wrote to OPM--and OPM disclosed Petitioner's query to DHHS. DHHS formalized the lab assignment in February 1988 and stated that Petitioner could avoid the lab assignment

only if Petitioner could produce the results of medical tests Petitioner's physicians had never heard of.

Petitioner demurred as to the lab assignment while accumulating all medical records, the older ones proving impossible to obtain. Petitioner requested transfers or any other duties besides those involving work near solvents, all to no effect. Petitioner had sufficient non-lab duties in her office job to stay employed but those were the duties DHHS was going stop Petitioner from performing so that Petitioner could enter a lab. Petitioner was told that a transfer was available and to contact DHHS in Washington but when the contact with DHHS Washington management was made to get details, that management stated that the "transfer" was for Petitioner to seek employment elsewhere, outside of DHHS.

Petitioner had been asked to resume lab duties in 1985 but that assignment was dropped after Petitioner's physician told Petitioner that instead of breathing problems, one day a solvent could cause Petitioner to stop breathing completely. Petitioner relayed this information to her then-supervisor and produced a letter from her physician written as a result of the above visit, a letter that restricted Petitioner from any solvent exposure.

The February 1988 request for medical records specifically stated that Petitioner provide medical records that showed the specific chemicals and the concentrations of those chemicals that caused the adverse breathing problems experienced by Petitioner. Thousands of chemicals and concentrations of same would have to be "tested" to give the data sought by Respondents; Petitioner's medical doctors stated no such medical tests existed and therefore could not be performed to give the requested

information. DHHS did disclose the existence of one U. S. physician who might perform such tests with the initial disclosure being made in the midst of the MSPB hearing. The one U. S. physician practiced in Denver, Colorado whereas Petitioner lived and worked in the Little Rock, Arkansas area.

When Petitioner could not produce the results of the medical tests requested by DHHS but which Petitioner's doctors had never heard of, Petitioner was assigned in early May 1988 to the labs with the initial assignment to be 32 hours a week, AWOL unless Petitioner was in the labs and 8 hours in the office doing Petitioner's scientific writing assignments. This split of time was temporary until such time as sufficient AWOL was accumulated so as to be enough to fire Petitioner. Petitioner

inquired as to the quantity of AWOL that the DHHS would accumulate and such sum was never disclosed. The split assignment was formalized on May 13, 1988 after being verbally made approximately one week earlier.

Petitioner thus expected to be terminated at any time but at an undisclosed time with only 8 hours compensable work assured until the undisclosed AWOL total was reached. Petitioner was at all relevant times a full time (40 hours a week) career federal employee with perfect employee job performance ratings over the time of January 1976 through the last rating in the fall of 1987.

Petitioner reviewed the handwriting on the wall and sought other employment on May 15, 1988. Petitioner refused to formally

resign, contending constructive termination of employment. DHHS kept Petitioner on the payroll system until late July 1988 and accumulated those post-May 13, 1988 hours as AWOL on the payroll system. DHHS fired Petitioner in late August 1988 based upon the post-May 13, 1988 AWOL and the allegation that Petitioner did not contact the DHHS after May 13, 1988. Petitioner and her attorney did contact the DHHS in this post-May 13, 1988 time period with such letters appearing in the MSPB administrative record.

DHHS had logged 14 hours of AWOL against Petitioner in April 1988: 8 hours for a day in which Petitioner took credit leave with the credit leave being retroactively changed to AWOL on the basis of a memo Petitioner's supervisor issued after the credit leave was taken and 6 hours two days

later for sick leave after the DHHS was given the actual medical records for that 6 hours, medical records that clearly showed treatment for a knee condition.

DHHS also issued a reprimand to Petitioner in early May 1988 for refusing to accept the first lab assignment made in early April 1988. That assignment was rescinded by DHHS after Petitioner had a strongly worded call with DHHS's medical advisor in Rockville, MD, the first of two calls he accepted. The second call was in the same time frame and was brief as the medical advisor refused to talk to Petitioner. The reprimand was issued after this first directive to enter the lab was rescinded. DHHS did not use the pre-May 13, 1988 AWOL in its total accumulated to fire Petitioner.

DHHS did not use the pre-May 13, 1988 AWOL in its total accumulated to fire Petitioner. DHHS did not use the early May 1988 reprimand either as a basis for termination.

DHHS's medical advisor twice stated in writing in the March-April 1988 time frame that he would not restrict Petitioner from lab duties unless Petitioner produced the medical tests results Petitioner's doctors had never heard of. But, DHHS contended throughout the litigation (after the medical advisor admitted in the MSPB hearing that he thought one U. S. doctor did the tests he had requested of Petitioner in February 1988) that DHHS really didn't mean what its advisor said in writing in the February-May 1988 time frame about the only-one-U.S.-doctor-does-them tests and that any medical records

documenting the phosgene-induced breathing problem would have been accepted. Those other records were tendered by Petitioner and rejected by DHHS in the February through May 1988 time frame. The breathing problem was memoralized in DHHS's own medical records on Petitioner and those DHHS records were ignored by DHHS. DHHS's medical advisor never examined Petitioner and never saw her until the MSPB hearing. DHHS ignored Petitioner's treating physicians' recommendations that Petitioner not be exposed to solvents.

DHHS never articulated a pre-May 13, 1988 reason for termination.

In the fall of 1987, the staff at the unit (NCTR) of the agency which employed Petitioner requested that Petitioner submit a "package" of information to the NCTR Support/Service Scientist Peer Review (Peer Review) committee. Peer Review was the position classification system that sparked Petitioner's comments at the open meeting in May 1987. The package consisted of past work history, current accomplishments, current grade and position, current position description and like information. A group of non-personnel staffers at the employing unit ther evaluate the package and set the employee's grade. A non-personnel staffer was the requestor of the information.

Petitioner requested permission to be removed from the Peer Review grading

system because Petitioner had not been in a lab doing support scientist lab work since 1980. The agency refused the request and demanded the package which Petitioner submitted after verbal cautions about the effect of not complying with the request for the package. The package was requested via use of a short note to Petitioner on agency memorandum letterhead; the request and the content of a Peer Review package were Petitioner's exhibits before the district court. That note did not comply in any respect with 5 U.S.C. Sec. 552a(e)(3).

BASIS FOR JURISDICTION IN THE FEDERAL DISTRICT COURT

42 U.S.C. Sec. 2000e-16(c) by operation of 5 C.F.R. Sec. 1201.158, 5 U.S.C. Sec. 7703(b)(2), 5 U.S.C. Sec. 7702(a)

5 U.S.C. Sec. 552a(g)(1)(D)

BASIS FOR CERTIORARI

1. There is conflict among the circuits as to whether the judicial review from MSBP decisions should involve application of the standards set forth in 5 U.S.C. Sec. 7703(c) to the employing agency's actions or application to the MSPB final decision. R.S.C.U.S. Rule 10(a).

2. The Eighth Circuit Court of Appeals has applied 5 U.S.C. Sec. 7703(c) to final decisions of the Merit Systems Protection Board instead of to the employing agency's actions in contravention of Department of Navy v. Egan, 108 S. Ct. 818 (1988). R.S.C.U.S. Rule 10(c).

3. The Eighth Circuit Court of Appeals has decided a federal question--the weight to give to credibility

based facts and facts determined on other bases determined by an MSPB administrative law judge acting under color of federal law--

contrary to this Court's decision in Universal Camera Corp. v. National Labor Relations Board, 71 S. Ct. 456 (1951).

4. The Eighth Circuit Court of Appeals decided an issue--the reasonableness of an employee's decline of a job assignment based upon health concerns--contrary to the United States Supreme Court's decision in Whirlpool Corp. v. Marshall, 100 S. Ct. 883 (1980). R.S.C.U.S. Rule 10(c).

5. The Eighth Circuit Court of Appeals has decided that it may affirm a lower court's decision in which the lower court chose among several disjunctively listed criteria set out in 29 C.F.R. Sec. 1613.701 et seq.

with the effect of such choice that the lower court chose the criteria that Petitioner could not satisfy and ignored those criteria Petitioner could satisfy and thus denied relief to Petitioner. This is an important question of federal law which has not been but should be decided by this Court, both in the general interpretation of statutes and regulations and in the specific context of the regulations proscribing discrimination against handicapped federal employees. R.S.C.U.S. Rule 10(c).

6. It is a departure from the usual course of judicial proceedings for the Court of Appeals to not address nor even mention three issues on appeal to that appellate court. R.S.C.U.S. Rule 10(a).

DISCUSSION

The bases numbered 1 through 3 relate to Issues 1 and 2, basis numbers 4 and 5 relate to issue 3.

BASIS 1

Petitioner has contended throughout the litigation that the standard for judicial review of a final decision of the Merit Systems Protection Board (MSPB) should involve the reviewing court's examination of the EMPLOYING AGENCY'S ACTIONS when applying 5 U.S.C. Sec 7703(c). The district court, when conducting its judicial review of the civil service portion of Petitioner's mixed case, applied the standards in 5 U.S.C. Sec. 7703(c) to the final decision of the MSPB and not to

the employing agency's "action, findings, or conclusions" and the Eighth Circuit upheld this interpretation of 5 U.S.C. Sec. 7703(c). Petitioner's contention that Sec. 7703(c) applies to the actions of the employing agency stems from several sources.

First, 5 U.S.C. Sec. 7703(c) uses the word "agency" in the first sentence. "In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--. . . ." In 5 U.S.C. Sec. 7703(a)(2) a clear distinction is made between the MSPB and the employing agency. Further, the judicial review is of the record created by the MSPB and if the review was to be of the Board's action, finding, or conclusions then Congress would have said so. Instead,

Congress used the word "agency" in the first sentence of 5 U.S.C. Sec. 7703(c).

The MSPB hears a limited, by regulation, set of appeals. 5 C.F.R. CH. II (1-1-88 Ed.) Sec. 1201.3. Those appeals are from actions taken against a federal employee by an employing agency of the United States government. Id.

As noted above, the MSPB creates the administrative record or "record" described in 5 U.S.C. Sec. 7703(c). To do so in the instant case, the MSPB assigned an administrative law judge (ALJ) to the case and held an evidentiary hearing. That ALJ made findings of fact based upon credibility determinations and also based upon the exhibits and other testimony. The record so created consists of not only the MSPB's evidentiary record of exhibits and testimony but also the initial decision of the ALJ in this case and the final decision

of the full Board. Petitioner contends that the judicial review should apply the standards of Sec. 7703(c) to the employing agency's actions as developed and memorialized in this record.

In the instant case, the reviewing district court took a part of the record, the final Board decision, and applied the Sec. 7703(c) criteria to that small part of the record, ignoring the rest of the record which included the ALJ's credibility based findings and evidentiary exhibits. "Record" is apparently defined in 5 U.S.C. Sec. 7702(d)(1). Most worrisome was that the full Board's decision--the only portion of the record considered by the district court--overturned the ALJ and cited as reasons for so doing "evidence" not even in the record nor susceptible of inference from the record. Petitioner contends that had the district court conducted its

judicial review on the entire record as required by Sec. 7703(c), Petitioner would have prevailed.

The federal circuit has applied the 5 U.S.C. Sec. 7703(c) criteria to only the MSPB's final decision. "When reviewing a decision of the MSPB, this court will affirm that decision unless it is found to be: 1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; 2) obtained without procedures required by law, rule or regulation having been followed; or 3) unsupported by substantial evidence." Gromo v. Office of Personnel Management, 944 F.2d 882 (Fed. Cir. 1991). "We must affirm the Board's decision unless it is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, obtained without procedures requires by rule, law or regulation or unsupported by

substanital evidence." Addison v. Department of Health and Human Services, 945 F.2d 1184 (Fed. Cir. 1991). In accord with both Gromo and Addison are the Federal Circuit's holdings in Mendoza v. Merit Systems Protection Board, 949 F.2d 391, 393 (Fed. Cir. 1991), Webster v. Department of Army, 911 F.2d 679 (Fed. Cir. 1990) and Connolly v. United States Department of Justice, 766 F.2d 507, 511 (Fed. Cir. 1985), "[i]t is the final decision of the board we are now called upon to review."

The court in Connolly did recognize that the presiding official's decision is only a part of the record. Id. at 510. In contrast, the Federal Circuit reviewed an arbitra- tion decision under MSPB standards and concluded that the decision to remove the employee (agency's action) was properly reviewed using Sec. 7703(c). Hunt v. D.H.H.S., 758 F.2d 608 (Fed. Cir. 1985).

Other Federal Circuit decisions have applied Sec. 7703(c) to the employing agency's actions. The predecessor of the Federal Circuit, the D. C. Circuit, applied Sec. 7703 to the employing agency's actions. Hayes v. United States Government Printing Office, 684 F.2d 137 (D.C. 1982). Hayes dealt with whether a mixed case should be bifurcated but the court did state that "[i]f an employee does not allege that 'a basis' of the agency action was discrimination, he may appeal directly from the MSPB to the court of appeals or Court of Claims." Id. at 139. Further, a 1981 case also out of the D.C. Circuit also applied the Sec. 7703(c) standard to the actions of the employing agency. "We discharge our own duty when we apply section 7703 to review an MSPB decision regarding an adverse agency action to determine whether the contested decision

complies with the applicable statute and regulations and whether it has a rational basis support by substantial evidence from the record taken as a whole." Hayes v. Department of the Navy, 727 F.2d 1535 (D.C. Cir. 1984).

The First Circuit interpreted 5 U.S.C. Sec. 7703(c) as does Petitioner, i.e. "[a] court shall set aside the agency decision if it is found to be arbitrary or capricious, an abuse of discretion, obtained without procedures required by law, or unsupported by substantial evidence. 5 U.S.C. Sec. 7703(c)." Diaz v. United States Postal Service, 853 F.2d. 5, 8 (1st Cir. 1988).

The Second Circuit also interprets 5 U.S.C. Sec. 7703(c) as does Petitioner. "Confronted with the task of reviewing agency action dismissing an employee as a result of off-duty misconduct, courts face

a difficult dilemma." Borsari, v. Federal Aviation Administration, 699 F.2d 106, 109 (2nd Cir. 1983).

Weston v. United States Department of Housing & Urban Development, 724 F.2d 943 (3rd Cir. 1983) applied the interpretation of Sec. 7703 urged by Petitioner. The Weston court noted "[T]he decision of the MSPB is to be affirmed unless the action of HUD [employing agency] in terminating Ms. Weston has been shown to have been arbitrary, capricious, an abuse of discretion, not in accordance with law, not obtained in accord with procedures required by law, rule or regulation, or unsupported by substantial evidence." Id. at 948.

The Fourth Circuit appears to review the decision of the agency in deciding whether an employee was properly removed from service. Starrett v. Special Counsel, 792 F.2d 1246 (4th Cir.d9 1986). The

judicial review of the MSPB decision involved a detailed examination of the agency's actions as developed by the MSPB fact-finding process. Id.

The Fifth Circuit appears to judcially review the MSPB "action, findings, or conclusions" instead of those of the employing agency. Lyles v. United States Postal Service, 709 F.2d 359, 360 (5th Cir. 1983).

The Seventh Circuit also appears to apply the standards of 5 U.S.C. Sec. 7703 to the MSPB decision instead of the agency's actions. Ryan v. united States Department of Justice, 950 F.2d 458 (7th Cir. 1991).

The Eighth Circuit appears to adhere to the cases in the Seventh and Tenth Circuits. Grasso v. Internal Revenue Service, 657 F.2d 224 (8th Cir. 1981).

In Morales v. Merit System Protection

Board, 932 F.2d 800 (9th Cir. 1991) the Ninth Circuit determined that the district court could not make determinations relating to credibility in a discharge case. The Morales district court looked at the administrative record created by the Board and determined that charges the agency made against the employee had merit but that it was error for the district court to make its own credibility determinations from the record. It appears, from Morales, that the Ninth Circuit is following the position urged by Petitioner.

The Tenth Circuit noted that "[t]he review by the MSPB of a Chapter 75 action is denominated 'an appeal' of agency action." Jackson v. Veterans Administration, 768 F.2d 1325, 1329 (10th Cir. 1985). At footnote 4, the Jackson Court noted the following.

> The statute in 5 U.S.C. Sec. 703(c) refers ambiguously to this court's review of 'agency action' to determine if it is supported by 'substantial evidence.' In view of the de novo nature of the proceeding before the MSPB, this court has concluded that it must review the agency action based on the record made to the MSPB and the MSPB findings, rather than review the agency action solely on the basis of the agency's record. [Citations omitted.]

The Eleventh Circuit definitely, clearly and emphatically distinguished between the agency and the MSPB in Doyal v. Marsh, 777 F.2d 1526 (11th Cir. 1985). To make the distinction, Doyal noted H.R. Conf. Rep. No. 95-1717 which listed eight situations in which a federal employee had a right to file suit. Id. at n. 7. Doyal involved the issue of whether a mixed case proceeds as a unit through the appeals process.

A Louisiana court applied the 5 U.S.C. Sec. 7703 standards to the MSPB

decision, going so far as to supplant the word "agency" in Sec. 7703(c) with "Board." Tilley v. Frank, 728 F. Supp. 1293, 1296 (M.D. La. 1990).

SUMMATION

The Federal Circuit has applied Sec. 7703(c) to both MSPB final decisions and to actions of the employing agency. The First, Second, Third, Fourth, Ninth, Tenth, Eleventh and Twelfth Circuits seem, from the cases, to follow the position urged by Petitioner. The Fifth and Seventh follow the position of Respondents as does the Eighth Circuit or this petition would not have been filed.

SECOND BASIS FOR CERTIORARI

In Department of Navy v. Egan, 108 S.

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Ct. 818 (1988) this Court held that federal employees covered by the MSPB regulations "may appeal the agency's decision to the Board . . . which is to sustain the action if it is 'supported by a preponderance of the evidence.'" Id. at 821.

The district court and the Eighth Circuit Court of Appeals applied the standards of 5 U.S.C. Sec. 7703(c) to the final decision of the full MSPB board and not to the actions of the employing agency as required by Department of Navy v. Egan, 108 S. Ct. 818 (1988).

THIRD BASIS FOR CERTIORARI

The MSPB's ALJ made credibility based findings of fact and those findings were ignored by the full Board which set aside the ALJ's initial decision in favor of

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Petitioner. Specifically, Petitioner prevailed on three claims because of the evidentiary record and because of the credibility based findings of fact made by the ALJ. The full Board, on review requested by Respondents, simply ignored the ALJ's credibility based findings of fact and then supplied findings of its own, findings that in several instances were not in the evidentiary record in the form of testimony or exhibits. As such, the Board's actions were at variance with the MSPB regulations and were also at variance with the holdings of this Court in Universal Camera.

This Court in Universal Camera Corp. v. National Labor Relations Board, 71 S. Ct. 456 (1951) held that credibility based findings of fact should not be disturbed on judicial review unless it would be clear error to allow those findings to

stand.

> Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.

Universal Camera Corp. v. National Labor Relations Board, 71, S. Ct. 456, 468 (1951). Neither the district court nor the court of appeals in the instant case referenced Universal Camera. Universal Camera applies to MSPB decisions because the MSPB is an ajudicatory agency just as is the National Labor Relations Board.

The MSPB ALJ's decision is an "initial decision" which becomes final upon passage of time. 5 C.F.R.Ch. II(1-1-88 Ed.) Secs. 1201.111 and

1201.113. There is no additional fact finding made by the Board beyond that of its ALJ.

As such, the regulation promulgated by the MSPB and cited above does not substantively deviate from the maxim set forth in Universal Camera. If the MSPB ALJ's credibility based findings or any other findings could summarily be ignored by the full Board or on judicial review then presumably Congress would have said so.

If the full Board or the district court or the court of appeals had applied Universal Camera as required then Petitioner would have prevailed because the Respondents did not show that the ALJ's findings, credibility based or otherwise, were clearly erroneous.

BASIS FOR CERTIORARI NUMBER FOUR

This Court, in Whirlpool Corp. v. Marshall, 100 S. Ct. 883 (1980) held that an employee may refuse to perform an assigned task if the employee's fears for his health and safety are reasonable.

The Eighth Circuit held that the appropriate standard was "justifiable" and not reasonable. "Justifiable" was not quantitated but ordinary word usage indicates that "justifiable" places a burden on the employee to convince the employer of the genuineness of the employee's fears whereas "reasonable" is a lesser standard for an employee to satisfy.

Had the Eighth Circuit applied the "reasonableness" test to the facts of Petitioner's case, Petitioner should have prevailed.

BASIS FOR CERTIORARI NUMBER FIVE

Petitioner prevailed before the MSPB's ALJ on the issue of handicapping discrimination, a determination set aside by the full Board. After trial de novo on this issue, Petitioner lost before the district court and the court of appeals when the latter two chose among criteria set apart by the word "or" and chose the criteria so set apart in such a way as to chose the criteria least fitted to Petitioner's claims where, had the district court and court of appeals chosen other of the disjunctively listed criteria, Petitioner would have prevailed.

Petitioner states that if a series of criteria are set apart by the word "or" and if Petitioner fits one of the criteria so listed then that should allow recovery for Petitioner. To restate, the trial

court and court of appeals, on review, should not select the least appropriate of several criteria listed and separated by "or" as the sole basis for recovery.

Federal employees are protected against discrimination based upon the employee's handicapping condition. Recovery is allowed if the employee fits a series of specifically defined terms. 29 C.F.R. 1613.701 et seq.

The ALJ chose the criteria listed in 29 C.F.R. Sec. 1613.701 et seq., separated by "or" that fit the facts of the case, and held Petitioner was a handicapped individual.

The district court chose the poorest "fit" of the criteria separated by "or" and denied Petitioner recovery on the handicapping claim.

This area of statutory interpretation

should be clarified, particularly in the context of 29 C.F.R. Sec. 1613.701 et seq.

SIXTH BASIS FOR CERTIORARI

A timely appeal from a district court to a court of appeals is a right available to litigants. 28 U.S.C. Sec. 1291. It follows that if the issue is properly appealed as the Privacy Act claim dealing with the deficiency of the form requesting information was, then the litigant is entitled to have the Court of Appeals review the district court's opinion on the issue. The Court of Appeals failed to even mention, much less address, the issue of the sufficiency of the request for information made under the Privacy Act.

Petitioner raised two Privacy Act

claims in her complaint. One dealt with release of information; the other attacked the request for information on the theory that proper procedures were not followed in obtaining the information adn that persons not entitled to the information were the ones requesting the information.

At trial, Petitioner introduced, without objection on the part of the Agency, evidence that established that the document used to request the information did not conform to the Privacy Act. The Act details explicit requirements for a form used to requet information covered by the Privacy Act.

The inadequacies of the form used to request Privacy Act information were briefed in the district court post-trial

brief. That same "inadequacy-of-form" issue was before the Court of Appeals which did not mention any Privacy Act claims/issues in its opinion.

Petitioner contends that the mandatory language of 28 U.S.C. Sec. 1291 confers jurisdiction on the Court of Appeals of "all final decisions of the district courts of the United States . . . " and a fair reading of Sec. 1291 is that the entirety of the final decision is before the Court of Appeals and the Court of Appeals must address all issues within that final decision. The address may be perfunctory or brief but the issues must be addressed. This the Court of Appeals failed to do, thus depriving Petitioner of that tier of review, a tier granted under 28 U.S.C. Sec. 1291.